**AWANG KAMALUDDIN MOHD DAUD & ORS**

**v.**

**PP**

COURT OF APPEAL, BRUNEI DARUSSALAM
FUAD PCA
HUGGINS JCA
CONS JCA
[CRIMINAL APPEAL NOS: 19, 20, 21 & 22 OF 1997]
12 MAY 1998

***CRIMINAL PROCEDURE:*** *Prosecution - Consent of Public Prosecutor - Whether implicit in action conducted by Deputy Public Prosecutor - Criminal Procedure Code (Brunei), s. 374(1)*

***CRIMINAL PROCEDURE:*** *Jurisdiction of court - High Court - Whether has power to review own decision - Criminal Procedure Code (Brunei), s. 240 - Whether "court" in proviso to s. 240 excludes High Court*

***EVIDENCE:*** *Confession - Co-accused's confession - Whether conviction may be based on - Evidence Act (Brunei), s. 30 - Whether trial court misinterpreted and misapplied s. 30*

***EVIDENCE:*** *Admission - Whether amounts to confession - Fourth appellant did not admit having intention to kill - Whether an element required for a confession - Whether s. 30 Evidence Act (Brunei) applicable if statement not a confession*

***CRIMINAL PROCEDURE:*** *Charge - Illegal possession of firearm under s. 28 Public Order Act (Brunei) - Joint charge – Whether proper - Whether separate charges appropriate as each appellant possessed firearm at different place and time*

***CRIMINAL PROCEDURE:*** *Charge - Amendment of - Failure of trial court to comply with statutory requirements - Whether a mere irregularity - Whether curable under s. 415(2) Criminal Procedure Code (Brunei)*

***CRIMINAL PROCEDURE:*** *Court - Constitution of trial court - Whether proper - Trial judge sat as magistrate in remand hearing and recorded complaint of second appellant - Whether as magistrate he should have examined second appellant on oath as to substance of complaint - Criminal Procedure Code (Brunei), s. 133(1)*

***CRIMINAL PROCEDURE:*** *Trial - Presumption against accused - Driver of getaway car deemed to have taken part in robbery - Whether mere fact that third appellant was driver of getaway car created presumption that he participated in robbery*

The four appellants herein were jointly tried in the High Court for gang robbery and murder ('the 1st charge') under s. 396 of the Penal Code (Brunei) ('PC') and for the illegal possession of a firearm ('the 2nd charge') under s. 28 of the Public Order Act (Brunei) ('POA'). They were all convicted of the said charges and sentenced to death except the 3rd appellant who was acquitted on the 2nd charge. The appellants appealed.

The issues for determination were: (1) whether there was consent from the Public Prosecutor ('the PP') as required by s. 37 POA to try the 2nd charge considering that the prosecution in the trial court was conducted by the Deputy Public Prosecutor ('the DPP'); (2) whether the trial court, having earlier discharged the first, second and fourth appellants on the 2nd charge, had the power to review this decision and convict them subsequently; (3) whether the trial court had based the convictions solely on the confession of a co-accused and misinterpreted s. 30 of the Evidence Act (Brunei) ('EA'); (4) whether the statement made by the fourth appellant was a confession considering that he did not admit to having the intention to kill and as such, whether his statement relied upon by the prosecution to establish the murder element under s. 396 of the PC could be used against the other defendants by virtue of s. 30 EA; (5) whether the appellants should have been charged separately in relation to the 2nd charge as each appellant possessed the firearm at a different place and time; (6) whether s. 30 EA was applicable if four separate charges of possession were laid; (7) whether the trial court erred in amending the 2nd charge the way it did, ie, delivering judgment without complying with the procedure laid down in ss. 158 and 159 of the Criminal Procedure Code (Brunei) ('CPC'); (8) whether the constitution of the trial court was proper as one of the trial judges therein sat as a magistrate in the remand hearing of the second appellant wherein a complaint from the second appellant was recorded; (9) whether the magistrate should have examined the second appellant on oath as to the substance of the complaint in accordance with s. 133(1) CPC; and (10) whether the trial court was wrong in making a presumption that the mere fact the third appellant drove the getaway car meant that he took part in the robbery.

**Held:**
**Per Fuad PCA**

**[1]** Under s. 374 (1) CPC, the PP has the direction and control of criminal prosecutions under the CPC and any other written law. When the PP has delegated all the powers vested in him by the CPC, the delegation includes the PP's power under s. 374(1) CPC. As the prosecution was conducted by the DPP, the consent of the PP was implicit in his action and no written consent of the PP was required. The trial in respect of the 2nd charge was proper, and the court had the jurisdiction to try the appellants.

**[2]** The trial court's reliance on s. 240 CPC to review the decision to discharge the first, second and fourth appellants was not misplaced. By virtue of the opening words of s. 2(1) CPC, "unless the context otherwise requires", the word "court" in the proviso to s. 240 CPC does not include the High Court. The trial court adopted a legitimate, sensible and perfectly fair course in reversing its own decision in the interest and justice of the case.

**[3]** The trial court did not misdirect itself in interpreting and applying s. 30 of EA. This was confirmed by its dismissal of the 2nd charge against the third appellant since the only evidence of possession of a firearm by him was in the statement of the second appellant.

**[4]** The statement has to amount to a confession for s. 30 EA to come into play. Since a confession necessarily affects the maker, the words "affecting himself and some other of such persons" in s. 30 clearly mean "affecting not only himself but also some other persons".

**[4a]** Where the question of s. 30 of the EA arises on the joint trial of charges under s. 396 of the PC, the admission of facts amounting to murder is not an element required in any confession, for the charge may be made out even if the actual murderer is not charged or even identified. The statement of the fourth appellant did amount to such a confession. The only inference that could reasonably be drawn from his words was that he did intend to kill.

**[4b]** As to the 2nd charge, even if the appellants were charged separately, that would not have altered the position with respect to s. 30 EA. This was because the offences were of the same definition arising out of a single transaction, namely the procurement of a firearm for the furtherance of the joint robbery. Further, as the prosecution sought to

establish that the same gun had been handled by each of the appellants for the purpose of and in connection with the same robbery, it was proper to have charged them jointly.

**[5]** For the 2nd charge, it was only necessary to prove that the accused was in possession of a firearm. The case did not depend on the gun being the one mentioned in the 2nd charge. As such, the amendment to the 2nd charge by deleting the make and serial number of the gun did not give rise to an entirely different case.

**[5a]** Since the trial judges did consider it desirable to amend the charge, it would have been better if they had indicated what they had in mind inviting submissions from counsel before delivering judgment. However, as no miscarriage of justice actually occurred, the omission to comply with the statutory requirements was an irregularity curable under s. 415(2) CPC.

**[6]** The trial judge sitting as magistrate in the remand hearing was not taking cognisance of an offence on "a complaint" of the kind contemplated by s. 133(1) CPC when read with the relevant definition in s. 2(1) CPC. He was only doing his duty recording something important that a remand prisoner had said during his remand hearing. It would have been wrong for the magistrate to have investigated the matter on that occasion. As such, the constitution of the trial court was proper.

**[7]** The trial court did not suggest that the mere fact that a person is proved to have driven a robber away from the scene of robbery creates a presumption that he was also one of the robbers. The use of the expression "getaway car" negatives this. A getaway car is one which is used to help someone escape from the scene of a crime and driven by a culprit who has been waiting nearby for that purpose.

**[8]** Based on the findings of one of the wounds in the deceased's post mortem alone, there was sufficient proof of intention to murder.

*[Appeals dismissed.]*

**Case(s) referred to:**
*Abdullah Awang Bonkok v. PP [1956] 22 MLJ 90* ***(refd)***
*Anandagoda v. The Queen [1962] 28 MLJ 289* ***(foll)***
*Bhuboni Sahu v. The King [1949] AIR 257* ***(refd)***
*Chin Seow Noi v. PP [1994] 1 SLR 135* ***(refd)***
*Dr Jainand & Anor v. Rex [1949] AIR 291* ***(refd)***
*Mohd Noh Ramli v. PP [1995] JCB 198* ***(refd)***

*Morarka v. The King [1948] AIR 82* ***(refd)***
*PP v. Chong Yaw Mui & Ors [1996] JCB 244* ***(refd)***
*PP v. Mohamed Halipah [1982] 1 MLJ 155* ***(refd)***
*PP v. Mohamad Noh Ramli [1994] JCB 292* ***(refd)***
*PP v. Nordin Johan [1983] 2 MLJ 221* ***(refd)***
*PP v. Oie Hee Koi & Associated Appeals [1968] 1 MLJ 226* ***(refd)***
*Prasong Bunsom & Ors v. PP [1995] 3 SLR 433* ***(foll)***
*Punjab Singh v. Emperor AIR [1933] Lah 977* ***(refd)***
*R v. Bates 191 CCA 153* ***(refd)***
*Shahrin Tarang v. PP [1994] JBC 430* ***(refd)***
*Sheroo v. Emperor [1925] AIR N 78* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code [Brunei], ss. 2(1), 133(1), 158, 159, 184, 186, 240, 374(1), (3), 375, 415(2)
Evidence Act [Brunei], ss. 17(2), 30
Penal Code [Brunei], ss. 34, 300, 390(2), 391, 396
Public Order Act [Brunei], ss. 2(1), 3(1), 28(2), (3), 37

Criminal Procedure Code [Malaysia], s. 376

**Other source(s) referred to:**
*Sarkar's Law of Evidence*, 12 edn, pp 331, 324

*For the 1st appellant - Christopher Sawan; M/s Ho & Siong*
*For the 2nd appellant - M/s Daud Ismail & Co*
*For the 3rd appellant - Yusof Halim; M/s Sarjeet & Co*
*For the 4th appellant - Sivabalan Sankaran; M/s Ahmad Isa & Partners*
*For the PP - Ahmad Zakaria (Rozaiman with him)*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Fuad PCA:**

These consolidated appeals arise out of a trial in the High Court before the Chief Justice, Dato Sir Denys Roberts, and Chong J which concluded on 20 November 1997. We will use the shortened form of the appellants' names and the numbers employed by the trial court. Kamaluddin Bin Hj Md Daud ("Kamaluddin (D1)"), Ak Zainol Ariffin Bin Pg Jamaluddin ("Zainol (D2)"), Ak Suharta Bin Pg Bubin ('Suharta (D3)") and Gary Amatus Bernadus ("Gary (D4)") were all convicted of gang-robbery during which murder was committed, punishable under s. 396 of the Penal Code (1st charge). All the four defendants were also charged with the illegal possession of a firearm contrary to s. 28 of the Public Order Act (2nd charge). Suharta (D3) was

acquitted on that charge while the others were convicted. The mandatory sentence of death was passed in respect of all the convictions. All the defendants now appeal to this court against their convictions.

Section 396 of the Penal Code is in these terms:

> 396. If any one of 2 or more persons, who are conjointly committing gang-robbery commits murder in so committing gang-robbery, every one of those persons shall be punished with death.

Thus in relation to the 1st charge, the prosecution had to prove (a) that there was a robbery (defined in s. 390(2) of the Penal Code); (b) that it was a gang-robbery (defined in s. 391 of the Penal Code) and (c) that one of those jointly committing gang-robbery committed murder (defined in s. 300 of the Penal Code) in the course of the robbery.

For the offence laid in the 2nd charge, the prosecution was required to prove that the accused had in his possession a firearm (defined in s. 2(1) of the Public Order Act) in a special area (designated by the Minister under s. 3(1) of the Act) without lawful excuse and lawful authority. The only circumstances in which a person is deemed to have lawful authority for his possession are set out in s. 28(2) of the Act. A person is deemed to have lawful excuse for possession only if he can bring himself (the onus being on him) within s. 28(3) of the Act.

The elements of the two offences charged are fully set out and discussed in the judgment. None of the counsel appearing before us has sought to submit that the applicable law has been misstated as a proposition of law.

Nor do the appellants challenge the trial court's interpretation of s. 396 of the Penal Code, based on the Singapore case of *Prasong Bunsom and Others v. Public Prosecutor* [1995] 3 SLR 433 (which discusses a number of authorities on provisions which are similar to s. 396) where it was held that provided it is proved that murder is committed by a person who is conjointly committing gang-robbery with others during the course of the commission of the gang-robbery, then everyone who is conjointly committing the gang-robbery is liable to be punished under s. 396 and not only the member of the gang who is shown to be responsible for the murder. In one of the authorities cited in the Singapore case relied upon by the judges, *Punjab Singh v. Emperor* AIR [1933] Lah 977, it was held that in order to render the dacoits (other than the one who actually committed the murder), liable under a section in the same terms as s. 396, for the act of the murderer, it was not necessary that murder should have been within the contemplation of all or some of them when the dacoity was planned, nor was it necessary that they should have

actually taken part in, or abetted, its commission. They may not have been present at the scene of the murder, or may not even have known that murder was going to be or had in fact been committed (see also *Mohd Noh bin Ramli v. Public Prosecutor* [1995] JCB 198).

With regard to the firearms offence, the court held that if any of the accused was found to be carrying a firearm or to have it under his control, he would be guilty of the offence under s. 28 of the Public Order Act. No minimum time for the possession had to be proved to support a conviction. It was sufficient if the accused had the firearm in his possession for a very short time. What had to be proved was that at some time the accused had a firearm in his possession even if he passed in to someone else thereafter. Temporary possession was enough. In the court's view actual possession or control had to be proved. Section 34 of the Penal Code (which provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act as if he himself had done it) could not be prayed in aid in support of a prosecution under s. 28 of the Public Order Act.

***Consent Of Public Prosecutor***

A question relating to the jurisdiction of the court to try the offence laid in the 2nd charge arose during the trial. Section 37 of the Public Order Act provides that "a prosecution for any offence under this Act shall not be instituted except with the consent of the Public Prosecutor". The section permits a person charged with any such offence to be arrested and remanded pending the obtaining of the necessary consent.

On 4 November 1997, after the prosecution case had been closed, Mr Siva Sankaran, counsel for Gary (D4), submitted that there was no evidence in relation to the 2nd charge that written or oral permission had been given and thus the trial of the firearms offence was a nullity. Mr Ahmad Zakaria, who is a Deputy Public Prosecutor, pointed out that under s. 375 of the Criminal Procedure Code the Attorney General was the Public Prosecutor and that the Public Prosecutor could delegate his powers to a Deputy Public Prosecutor. He argued that the fact that a DPP appeared, showed that there was consent. This was implicit.

The court upheld Mr Sankaran's submission and the note on the record reads:

> As there is no evidence of consent, the charges against all the defendants under the Public Order Act are void and must be quashed. The defendants are discharged under section 184 of the CPC. There are cases for all four to answer on the other charge.

On the next day, before the hearing proceeded on the 1st charge, Mr Zakaria moved the court to hear further submissions on the issue of consent and cited a Privy Council and a Malaysian authority to support his submission that the consent of the DPP (to whom all the powers of the Public Prosecutor had been delegated) was to be implied by his appearance in court.

Mr Sankaran was granted an adjournment until the following day, 6 November. When the court resumed, Mr Zakaria handed up a copy of GN 105 of 1987 by which all the Public Prosecutor's powers vested in him by the CPC had been delegated to Mr Zakaria, and submitted again that when the Public Prosecutor, or a DPP with all his powers, appears for the prosecution, the necessary consent was implicit.

Mr Sankaran maintained his stand and further submitted that once the court had made a decision not to call on the defence it could not change its mind.

The Court reversed its decision and ruled that all the accused (except Suharta (D3) who was found to have no case to answer on the merits) had a case to answer on the charge under the Public Order Act.

The judges returned to this matter in their judgment to give their reasons for their decision on 6 November. They drew attention to the fact that, in contrast with the wording of s. 37 of the Public Order Act, the Misuse of Drugs Act (Cap. 27) requires the necessary consent of the Public Prosecutor or of a DPP to be "in writing", and the Prevention of Corruption Act (Cap. 131) stipulates that the Public Prosecutor "personally" must consent to a prosecution under the Act.

After referring to GN 105 of 1987 which had conferred all the powers of the Public Prosecutor on the DPP who had conducted the prosecution, the judges cited the decision of the Privy Council in *Public Prosecutor v. Oie Hee Koi and Associated Appeals* [1968] 1 MLJ 226 which was followed by the trial judge in the case of *Public Prosecutor v. Mohamed Halipah* [1982] 1 MLJ 155. The passages in both judgments relied upon by the trial court are to be found in column 1 of p. 159 of *Halipah's* case:

> Their Lordships the Privy Council at page 154 in the case of *Ooi Hee Koi* said –
>
> > ... It was further argued that under section 80 of the Act the consent of the Public Prosecutor to the prosecution should have been and was not obtained. The answer to this objection is that the Public Prosecutor was himself the prosecutor and his consent was implicit in his action. The provision in section 80 requiring consent is applicable where prosecution

takes place, e.g. before a Sessions Court and the Public Prosecutor is not the actual prosecutor.

It is to be noted that in the above case [this was a reference to *Public Prosecutor v. Lee Chwee Kiok* [1979] 1 MLJ 45] the prosecution was conducted before the High Court by a Deputy Public Prosecutor who under the Criminal Procedure Code is vested with all the powers of the Public Prosecutor. On the authority of this case, it is clear that where the prosecution is conducted by a Deputy Public Prosecutor the consent of the Public Prosecutor is implicit in his action and no written consent of the Public Prosecutor is required.

The trial court's reasoning on this question is contained in the following passage of the judgment:

The Malaysian case, with which we agree, decides that no distinction can properly be drawn between the PP himself and a DPP to whom the PP has delegated all his powers, including a power to consent (though he cannot delegate his power to do so under Cap. 131). Once a DPP has had these powers vested in him, he becomes, effectively, the PP. He is, in other words, the alter ego of the PP and can do whatever the PP can do.

It was suggested that it was not open to the PP to delegate the power to consent, since the delegation section 374(3) CPC only permits the PP to delegate "all or any of the powers conferred by this Code to any DPP". The AG is appointed PP by section 374(1) CPC and has "general direction and control of criminal prosecutions and proceedings under this Code or under any other written law". We have no doubt that the phrase "general direction and control" includes the power to consent to a prosecution, and that this power may properly be delegated by the PP to a DPP under section 374(3) CPC.

If we had known of these cases on 6th November, would we have felt obliged to follow them? The Malaysian case is no more than a persuasive authority and does not bind us, but the Privy Council case does. The doctrine of *"stare decisis"* and the terms of the Application of Laws Act (Cap. 2) oblige us to follow decisions on the common law of the Privy Council, so far as these are applicable. In this instance, the same wording is being construed. We therefore feel obliged to follow them, though if it was not for them we would have been inclined to require a consent to be in writing.

The three appellants who were convicted of the firearms offence (D1, D2 and D4) all raise the issue of the lack of the consent required for a prosecution under the Public Order Act on this appeal, and they also maintain their stand that the judges had no power to review their decision to discharge them on the 2nd Charge at the close of the prosecution case.

Section 374 of the Criminal Procedure Code is in the following terms:

374. (1) The Attorney General shall be the Public Prosecutor and shall have the general direction and control of criminal prosecutions and proceedings under this Code or under any other written law.

(2) His Majesty may from time to time appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise any or all of the powers under this Code as may be delegated to him by the Public Prosecutor.

(3) The Public Prosecutor may by notification in the Government Gazette delegate all or any of the powers vested in him by this Code to any Deputy Public Prosecutor and the exercise of these powers by such Deputy Public Prosecutor shall then operate as if they had been exercised by the Public Prosecutor, provided that the Public Prosecutor may in like manner revoke any delegation made by him under this section.

Mr Sankaran for Gary (D4) (Counsel for Kamaluddin (D1) and Zainol (D2) adopted his submissions on this issue) contended that since Mr Zakaria had conceded "that no actual consent was in fact given to these proceedings" the trial had been a nullity because the court lacked jurisdiction to entertain the case (see e.g. *R v. Bates* 191 CCA 153 and the Privy Council decision in *Morarka v. The King* [1948] AIR 82). In both those cases it was pointed out that the defect in jurisdiction was not an irregularity which could be cured by applying a proviso similar to s. 428(2) of the Brunei Criminal Procedure Code.

He submitted that the trial court should not have drawn support for its decision from *Mohamad Halipah's* case, because there the court had based its decision on the relevant provisions of the Criminal Procedure Code of Malaysia which differed from those in force in Brunei. Section 376 of the CPC of Malaysia states:

376.(1) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

(2) The Solicitor-General shall have all powers of a Deputy Public Prosecutor and shall act as Public Prosecutor in case of the absence or inability to act of the Attorney General.

(3) The Public Prosecutor may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the

> rights and powers vested in or exercisable by the Public Prosecutor by or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally.
>
> (4) ...

Mr Sankaran contended that it was clear that the powers that could be delegated to, and exercised by, a Deputy Public Prosecutor in Brunei, were limited to powers which derived from the CPC alone, whereas the Malaysian provision was wider, and concerned rights and powers conferred by the CPC and any other written law.

As provided by s. 374(1) of the CPC, the Public Prosecutor has the direction and control of criminal prosecutions under the CPC and any other written law. When the Public Prosecutor has delegated all the powers vested in him by the CPC, without any reservation, to Mr Zakaria, by the Gazette Notification, in our opinion the delegation included the Public Prosecutor's powers under s. 374(1).

In our judgment, the trial court came to the right decision, and for the right reasons, on the meaning and effect of sub-ss. (1) and (3) of s. 374, even though the Malaysian case would not have been regarded as "persuasive authority" in the light of the difference in wording between the relevant Brunei and the Malaysian provisions, if this difference had been brought to the attention of the court.

***Review Of Court's Ruling***

To explain why they had not accepted the submission that they were *functus officio* once they had given their ruling on the consent issue, and therefore had power to review their decision, the judges said this in their judgment:

> Section 240 CPC provides that no court, other than the High Court, having once recorded its judgment, shall alter or review the same. The proviso to that section does not apply to the High Court, since the section draws a distinction between "High Court" and "Court" and applies restrictions only to the latter. We regard this as sufficient justification for a review by this court of a decision reached on November 4th *per incuriam.* If we had known of the Privy Council decision, and of the Malaysian case which followed it, we would not have ruled as we did. Having been persuaded that we were in error, we altered the decision which we reached on 4th November.
>
> In addition to section 240 CPC, we relied on the common law rule that any ruling concerned with procedural matters, and not with the merits of the case, may properly be the subject of review by the person who made the decision. See *Price v. Humphries* [1958] 2 QB 353, in which it was held that an

objection to a lack of consent should have been taken by a defendant before the prosecution closed its case. If it is not, the matter may be re-opened.

The argument about consent was a technical one. The defence was fully entitled to take it and argue that the proceedings in this court, in relation to offences against Cap. 148, were a nullity. However, this submission had nothing to do with the merits of the case and should, in our view, have been raised at the outset, not after the prosecution had already closed its case.

Of course, it could be argued that, indirectly, the defendants had been prejudiced by a change in the ruling that such proceedings were void. Nevertheless, it has not caused them injustice. Their cases were always conducted on the basis that they would have to face the same charges as were brought against them at the outset of the trial. They had given no evidence, which could be said to have been affected by the ruling which was reviewed.

Before us, Mr Sankaran submitted that the trial court's reliance on s. 240 of the CPC had been misplaced and that the court had no power to review the decision to discharge D1, D2 and D4 on 4 November 1997.

Section 240 of the CPC states:

240. No Court, other than the High Court, having once recorded its judgment, shall alter or review the same:

Provided that a clerical error may be rectified at any time, and that any other mistake may be rectified at any time before the Court rises for the day.

He contended that the trial court had erred in concluding that the word "court" in the proviso to the section did not include the High Court so that that court was not affected by the restrictions it contained. He relied on the definition of "court" in s. 2(1) of the CPC which defines the word as meaning "the High Court and the court of a Magistrate".

We agree with the view of the trial Court as to how the proviso should be read. The definition to which Mr Sankaran referred applies, like all definitions in s. 2, "unless the context otherwise requires" (see the opening words of s. 2(1)). The context does require that "court" in the proviso does not include the High Court.

When the court discharged D1, D2 and D4 on 4 November 1997 they indicated that they had acted under s. 184 of the CPC. We think that this was probably intended to be a reference to s. 186 (which allows the court of its own motion to stay proceedings and discharge the accused). Whether or not those provisions were apt for the situation, there can be no doubt that once it was concluded that no consent had been given, a discharge was the only order that

could be made, for any trial would be a nullity since there was no jurisdiction to try the 2nd charge. The court did not, and had no power to, acquit the three accused concerned.

When the court was persuaded that the discharge had been ordered on erroneous grounds, the accused were still on remand before the court on the other charge and no further evidence had been heard. It was a matter for the court's discretion as to how it should act in the circumstances. In our view the court adopted a legitimate, sensible and perfectly fair course in reversing the 4 November decision and continuing with the trial on the 2nd charge. We do not see how the interests of justice could better have been served. The accused had not been, and could not have been, acquitted. D1, D2 and D4 could have been brought before the court again on the same charge once the consent requirement was satisfied (on the view of the law held by the court when they discharged the accused). A great deal of time and money was saved and no suggestion of prejudice to them has been made to us.

***The Case For The Prosecution***

The case for the prosecution on the 1st charge was that the four accused jointly committed gang-robbery at the premises of Tiong Hin's Superstore ("THS" or "the Store") and that one of their number, Gary (D4), committed murder in the course of the robbery so that they were each punishable under s. 396 of the Penal Code.

Evidence was led that about 10 p.m. on 31 January 1997, Analiza Morales (PW1), THS's Chief Cashier, was in the manager's office, counting the cash that she had collected from other cashiers. She had been escorted there by Clarence, one of the security officers. The manager of the store, Mr Lim Chiu Kheng, had come into the office whereupon Clarence had left it. Mr Lim sat in a chair and they were counting the cash when there was a knock on the back door of the office which was used only by the staff. When Analiza opened the door, she saw Gary (D4) in front of her, in uniform, holding a gun. Gary shot her in the chest. She fell to the ground and pretended to be dead. She could not remember anything more after that, save that she heard footsteps leaving the room. After that she staggered outside and collapsed. She knew Gary (D4) and Kamaluddin (Dl) who were security guards at the Store in January 1997.

Very shortly afterwards, Mr Lim was found still in his chair. He had been shot twice and was dead. Gary (D4) made off with the money that was being counted, leaving $450 behind. It was an agreed fact that $29,162 of the store's takings were missing after the robbery.

As regards Kamaluddin (D1), Zainol (D2) and Suharta (D3), the prosecution sought to show that their acts before, at the time of, and after the murder of Mr Lim proved their involvement in a gang robbery for the purposes of s. 396 of the Penal Code.

We will first refer to the case against Gary (D4) in view of the principal part he was found to have played in the robbery and murder. The court accepted Analiza's evidence (PW1) that she was able to identify Gary as the person who shot her. She had known him as a Security Guard at THS for about a year during which she met him at least six times a week. Having considered the **Turnbull** guidelines (and noting that no identification parade had been held, the witness first identifying the accused in the dock) the judges felt that she could not have been mistaken and had correctly identified Gary.

Gary (D4) was arrested on 31 July 1997 by the Malaysian police in Johore. There, on 1 August, he made a short statement to ASP Pg Md Roslin (PW30) which, after being recorded in the ASP's notebook, was read over to, and signed by him. The entry read: "Gary admitted shooting a female Filipina once. She opened the door. The lady fell. Mr Lim stood up and grabbed my hand and the pistol went off because Mr Lim pulled the pistol."

In his statement after notice of warning, dated 4 August 1997, Gary said that he went to the upper floor of THS with Kamaluddin at 10 p.m. There, Kamaluddin gave him a loaded pistol which he said he had got from two police friends of his. He had met the two policemen about three hours earlier on the ground floor of the store. Kamaluddin told him that if he did not commit the robbery he would have to pay $10,000 to the policeman "with a big body" (shown by other evidence to be Zainol). Kamaluddin also told him that he should return the pistol to him, so that he could give it back to the two policemen.

His statement continues that, while Kamaluddin waited outside, he knocked on the door of the office of the owner of the store which was opened by a Filipina woman whom he knew to be the Chief Cashier. He pointed the pistol at her. She shouted and then held the pistol by the barrel. He then said:

> ... then I shot her because she tried to pull the pistol. As far as I remember, just one shot and she fell down on the floor. It happened so fast. After that Mr Lim, the owner of Tiong Hin Superstore, who was inside the office, was counting money which was in the plastic bag, got up from the chair and approached me, and tried to grab the pistol from my hand, then he held my hand strongly and I shot him once, and he fell to a sitting position, but his hand was still holding my pistol. I mean both his hands were holding my pistol at the same time fell to a sitting position and shouting and I did not understand

a what he shouted, then I shot him for the second time, and might be the third, until his hands slipped out of my pistol. ...

His narrative goes on to say that Kamaluddin was no longer there when he left the office. He went to the back of the building and met a short policeman (shown to be Suharta) whom he knew, but not by name. He gave him the b money and the pistol. He then climbed into the policeman's car which drove him to the hostel where he was lodging, to get his clothes. Then the same policeman took him in his car to the Gadong police area. Later that policeman returned with the policeman who had a big body. They gave him money and told him to leave Brunei through the border. He was taken by the policeman c with a big body to the Kuala Lurah post and dropped some distance away from the gate. He was told not to come back to Brunei. He found that he had been given over $5,000. He added "I plead guilty to the charge read to me of robbing and murdering Mr Lim and causing hurt to the Filipina Chief Cashier".

d When his statement was read back to him he said he wished to add that before he entered Mr Lim's office that night, Kamaluddin told him to murder both of the people inside and take all the money. He understood this instruction was to murder Mr Lim and the Chief Cashier.

e In his sworn evidence before the court, Gary (D4) completely denied any involvement in the robbery, or the shooting of Analiza or Mr Lim. He said that while he was on duty at THS on 31 January Mr Lim had accused him of being involved in stealing money and goods from the store during the previous month. He decided to get rid of many stolen items from his room f at the hostel where he lived. When he arrived there he realised that he could not dispose of all the things he had stolen and so he had decided to run away. He had cut his hand when he lifted his locker to take the money, about $20,000, which he kept under it.

Kamaluddin (D1) made a statement after notice of warning, recorded by Insp. g Muhaimin, on 2 February 1997. He had been a PC in the Royal Brunei Police Force; in the Special Operations Section. He had worked as a Security Guard at THS since 1 December 1996. In early January 1997 Gary had told him that he had been hired by somebody to kill someone from Limbang and that the hirer would pay him $80,000. Gary said that if he (Kamaluddin) could h get a firearm he would be given 20% of the proceeds.

When they reached the RUC in his car, he spoke to Zainol in the latter's car, telling him that he had been hired to kill someone from Limbang for $80,000.

i

He asked Zainol to obtain a Browning pistol, a magazine and some bullets. If Zainol managed to do so, he told him, he would give him $10,000. Zainol gave him 50 rounds of ammunition on that occasion which he handed over to Gary. On 29 January 1997 Zainol contacted him and asked him to come to the RUC to collect a Browning and one magazine. Zainol gave him these at about 7.30 p.m. At 7.45 pm he arrived at the store and gave the firearm to Gary and waited in his car. At about 10 pm Gary told him that the plan to rob the store had been cancelled, and gave him back the Browning, the magazine and the bullets. He, in turn, gave these back to Zainol saying that his (Kamaluddin's) plan to rob the Store had been cancelled.

His statement continues that on 30 January he was contacted again by Zainol and was given a Browning, a magazine and 10 bullets at 9.30 pm. He gave these items to Gary. Gary told him that it was too late to do the robbery that night.

Kamaluddin's (D1) statement continues:

> On 31.1.97 Gary and I planned to commit the robbery at 7.30 pm where at that time cash collection would be made. At 5.30 pm the collection of money was made and guarded by Gary. I asked Gary to do it at that time but Gary refused because the firearm was left in the hostel. At 6.00 pm Gary went back to the hostel to get the firearm. After that Gary told me that he wanted to commit the robbery at 9.30 tonight. I contacted Pg Zainol Ariffm to ask him to come to Tiong Hin at 7.30 pm. When Pg Zainol Ariffm came to see me at Tiong Hin I then told that I wanted to rob Tiong Hin tonight at 9.30 pm and after the robbery I asked him to wait for me in the toilet to hand him the firearm. While I was explaining the matter Pg Zainol Ariffm was with his friend Ak Suharta. I thought Ak Suharta did not know our plan. I only knew that Ak Suharta came to Tiong Hin along with Pg Zainol Ariffin. At 9.30 pm the collection of money was begun I then informed Gary. I told him that murder should not happen and just used the firearm for threatening. Gary understood and asked me to wait in the toilet.

After he had been in the toilet smoking with Clarence he left it to warn Gary that Clarence was there. He did not find him. Later, he said that he heard some explosions coming from the manager's room and saw Analiza covered with blood. He then realised that Gary had used the firearm. "After that I disregarded the plan we had made". He said that Gary knew his plan to hand over the firearm to Zainol that night. He also knew that Zainol was waiting outside THS.

Kamaluddin elected to make an unsworn statement to the court in his defence denying any involvement in the robbery at the store. He said that he was on duty that night at THS and when Analiza and Mr Lim were shot, he was smoking in the toilet with Clarence.

Zainol (D2), who is a Police Constable in the Royal Brunei Police Force, made a Statement after Notice of Warning on 2 February 1997. It was recorded by Ag. DSP Mohd Zaini (PW38).

In the statement he said that on 30 January 1997, at 7.30 pm he had been forced by his friends Kamaluddin and Suharta to get a firearm from the SOS armoury at RUC, Gadong. Suharta asked him to get the key of the armoury. When they drove to guard I in his car, Suharta asked the man on duty, Monil, for the key. When Monil enquired why it was wanted, Suharta said it was to take a bag containing "50 pills" into the armoury. The key was not then handed over.

About 20 minutes later Monil gave the keys to him. While Kamaluddin and Suharta waited in his car, he unlocked the armoury door and took a firearm (a browning) and an empty magazine. He re-locked the door. Kamaluddin took the firearm from him. He then handed the keys back to the person on duty. When he was asked why he had taken the keys, he replied that he had wanted to recover his wallet which he had left in the armoury. He then went home.

His statement continues that on 31 January 1997 at about 2.30 pm, when he was at a relative's house, Suharta came to see him and told him that Kamaluddin had asked him, by telephone, to come to THS. When he asked why, Suharta answered that Kamaluddin would tell how he (Kamaluddin) would return the firearm to Suharta after he had carried out the robbery.

At about 7.15 pm, he goes on to say, Suharta drove him to THS where he parked his car near the front steps. He went into the store with Suharta and waited for Kamaluddin to give instructions about the return of the firearm. Then Kamaluddin asked Suharta to park his car at the back of the store. Suharta did this. Zainol then said; "At that time I was inside the shop. After that, I waited for Kamaluddin to shoot, but Gary shot instead. After Gary did the shooting, he straightaway headed towards Suharta's car, and ran away from the shop, while I was still in the shop".

His narrative continues thus. Suharta came to fetch him from THS at about 10.30 pm and they drove to RUC. He found Gary waiting for them there. As soon as they arrived Gary gave the Browning firearm to him. He then went with Suharta to borrow the key of the SOS armoury from the NCO on duty. He put the firearm back into the armoury and returned the key. When they got back to RUC, Gary gave him $13,000 to be divided with Kamaluddin.

When the money had been divided, he drove Gary to Kuala Lurah. On the way Gary told him that he had shot the cashier once in her chest, and the manager with two bullets.

There was evidence that when interviewed by Sgt. Puasa (PW35) on 1 February 1997, Zainol (D2) had said something about money which he had left near some flowers at the Police HQ. As a result of information given him by Sgt. Puasa, Supt. Wahab (PW34) drove with Zainol and other police officers towards the Police HQ. Near the HQ Zainol asked them to stop and showed them a roll of money ($8,560 in notes) and a bag of the kind used by THS cashiers, containing $5,460.

In the testimony he gave in his defence, Zainol (D2) said that on 30 January 1997 he drove Suharta to RUC telling him he wanted to recover his wallet which he had left in the armoury while on duty there the day before. He was given the keys to the armoury by Monil but before he could use them he was called back by Suharta and told that the officer in charge of CP1 was looking for the keys. He returned the keys to that officer and told him why he had asked for them.

On the following day, 31 January, he was driven by Suharta to THS, arriving there at about 8.30 pm. Suharta had told him that THS had organised a competition, the winner of which would receive a car. They looked at the prize car. He then obtained an entry form for the competition and he and Suharta tried to answer the questions. Then there was chaos in THS. He saw a man running who told him someone had been stabbed. Suharta and his car were no longer there. He waited there for Suharta. When he saw him again 20 or 30 minutes later Suharta told him he had been asked, but had refused, to help a man who wanted to be taken to the border.

They then drove together to CP1 to recover his wallet. He was escorted to the armoury and after a search he did not manage to find it. At the batchelor's barracks he saw a stranger sitting in an old car. The stranger asked him for help to take him to the border. He did not want to accede to this request but the man got into his car and he had no choice. On the way to the border the man said that his family had sent for him due to an emergency.

Later, when he had parked his car at the operations room upon his return, he noticed that there was a brown bag made of cloth in his car. He thought it must belong to the man he had taken to the border. He found that the bag contained money. He panicked and threw the bag amongst some flowers. He denied having taken a gun from the armoury on 30 January and returning it on the following day.

Suharta (D3), who is also a Police Constable, gave a Statement after Notice of Warning on 2 February 1997 which was recorded by SI Zaidi (PW49). He

began his statement by explaining his interest in a competition THS was running and recounting what he had done in the early part of the afternoon of 31 January 1997. In the evening he told Zainol about the competition and drove him to THS arriving there at about 7.45 pm. Soon afterwards he saw that Kamaluddin and Zainol spoke together. He did not take part in their conversation.

When he went to his car to fetch his wallet so that he could buy something to eat, he saw a man running near the car park. The man ran to his car and shouted "open the door, open the door". He unlocked the door of his car from the inside and the man got in saying "go, go". He started the engine and then noticed that the man had a Browning pistol and there was blood on his right hand. He was asked by the man to take him to Sungai Akar. He began to realise that he had seen the man before in the company of three police constables and Kamaluddin.

On the way the man asked him to stop near Tiong Hin. The man went into a house and came back after about two minutes carrying a red box. He did not see the pistol again. The man asked to be taken to the Limbang border. He replied that he did not dare to do so. Instead he took the man to RUC and left him near Zainol's car while he went to fetch Zainol. He told Zainol what he had been asked to do by a friend of Kamaluddin. On the way back to RUC with Zainol he told him about the man, adding: "Other matters about the robbery he did not mention" when they reached where the man was waiting, Zainol said he would send him to the border.

The statement goes on to say that he saw the man handing Zainol a rolled up security guard uniform which he unwrapped and which contained a Browning pistol. Zainol wiped the pistol with the uniform. In Zainol's car they drove to the armoury.

He did not go in himself. Zainol told a police officer there that he had left his wallet in the armoury. He went on to say: "After Zainol put back the pistol he met me in his car (and said) 'only now I am relieved, I've put back the firearm'." Shortly afterwards, Zainol drove his car to where the man had been standing and said: "Alright, I send".

The man got into Zainol's car with his red box and passport.

Then Zainol called him to the car and the man gave him a parcel wrapped in coloured paper. When he asked what it was, the man said: "nothing, take it". Zainol drove off with the man. He hid the parcel at the back of his house, in the bush.

When he came to give evidence in his defence, he again spoke of the competition being the reason why he had gone to THS that evening. When the man he later realised was Gary got into his car with his bag and a gun, Gary had pointed his gun at him and this had frightened him. He denied telling the police that the man had given him a bag which contained money. What he had told them was that he found the bag in his car after the man had left. He had not realised that the bag had money in it until the police opened it. It was not true that he had not reported what had happened with Gary (here, he admitted that he had known his name at the time of his arrest) because he was involved with the robbery as the getaway man; nor was this the reason why he had wiped away Gary's bloodstains from the inside of his car.

As a result of what he had told a Cpl. Zulkifli, after his arrest, Supt. Wahab went to Suharta's house with him and other police officers. There, concealed behind his house, was found a bag with $6,000 in it.

All the accused challenged the admissibility of their statements after Notice of Warning. They were all admitted in evidence after the court had held a *voire dire* as to their admissibility. While all the appellants complain about the weight attached to these statements by the court, and the use against them of the contents of the statements made by their co-accused, only Kamaluddin (D1) and Zainol (92) still maintain that their statements were wrongly admitted.

We mention here that the prosecution had sought to rely on certain oral admissions allegedly made by some of the accused. In their ruling at the conclusion of the *voire dire* hearings, the judges said that none of these would be admitted in evidence, noting that the courts had warned the police on other occasions that, save in exceptional circumstances, an unrecorded oral admission, disputed by the alleged maker, would not be received in evidence.

***Section 30 Of The Evidence Act***

In the judgment, the judges discussed the application of s. 30 of the Evidence Act (Cap. 108) which reads:

> 30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession.

They noted that a co-defendant had his own purposes to serve – it was in his own interest to minimise his own part and blame other defendants. They would therefore approach the evidence of each defendant with this in mind. They

had looked in each case for some form of corroboration of the evidence of each defendant, because each of them was an accomplice. However, it would remain open for the court to accept the evidence of a co-defendant, if they were nevertheless satisfied, having warned themselves as to the dangers of accomplice evidence, that the co-defendant was a credible and reliable witness, whose testimony they could accept.

As for the use to which s. 30 of the Evidence Act could be put, the judges said this:

> We do not consider that we should follow the Singapore case of *Chin Seow Noi v. PP* [1994] 1 SLR 136, in which it was held that the confession of a co-defendant was sufficient, by itself, to sustain a conviction. We believe that such a confession must be corroborated in material particulars, before a conviction can be founded upon it. It was for this reason that we ruled that Suharta (D3) had no case to answer on the second charge, since the only evidence of possession of a firearm by him was in the Statement after Notice of Warning (SANW) of Zainol, a co-defendant.

The judges returned to statements made by a co-accused out of court in this passage in the judgment:

> In spite of the retraction of these statements, which affects weight only, we are prepared to rely upon them as true - see *Panya Martmontree v. PP* [1995] 3 LR 342, though other evidence corroborating a statement out of court by a co-defendant is to be required before there can be a conviction based upon it - see *PP v. Nordin bin Johan* [1983] 2 MLJ 221. If a confession is held to be true, it is effective proof of guilt against the maker of it and does not need to be corroborated, though it is prudent to look for corroboration.

Zainol (D2), Suharta (93) and Gary (D4) complain that the judges misdirected themselves in interpreting and applying s. 30 when considering the cases against them. Mr Halim's submissions on this issue were adopted by counsel for D2 and D4.

Mr Halim submitted that the two passages from the judgment set out above revealed that the judges had not followed the long line of authority approved by the Privy Council in *Bhuboni Sahu v. The King* [1949] AIR 257 where, at p. 260 Sir John Beaumont said:

> Their Lordships think that the view which has prevailed in most of the High Courts in India, namely that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction, is correct.

We cannot accept Mr Halim's submission. The first sentence of the first passage above makes it clear that the judges fell into no such trap. This is confirmed by their dismissal of the charge against Suharta (D3) and their citation, in doing so, of *Public Prosecutor v. Nordin bin Johan* [1983] 2 MLJ 221 where at p. 222 the Federal Court of Malaysia said:

> This leaves the question of the application of the provisions of section 30 of the Evidence Act 1950 in relation to the 2 respondents as a result of the statement made by Rahmat Satiman, the 3rd accused in these proceedings, which was admitted and accepted and which clearly implicates the 2 respondents. Section 30 provides that this statement may be taken into consideration against the 2 respondents but on the decided authorities the prerequisite to this is that there must be some cogent evidence against them quite apart from the statement of the 3rd accused. The nature of this evidence which would be extraneous to the confession of a co-accused and its qualitative and probative value in relation to the charge must ex necessitate rei be a factual matter in the context and circumstances of the particular case.

Further confirmation is to be found in the manner in which the judges set out and dealt with the case against each accused and then neatly summarised the whole on the penultimate page of their judgment. Evidence of this nature naturally required to be treated with caution. It is indeed evidence of an accomplice and a court can hardly be criticized for having corroboration in mind.

It is also interesting to note that in a case in 1994 - *Public Prosecutor v. Mohamad Noh Bin Ramli* [1994] JCB 292, the Chief Justice said this at p. 298:

> It has for long been understood that section 30 is only supportive of other evidence against a co-defendant and that a defendant cannot be convicted of an offence solely on the contents of a confession of a co-defendant.
>
> This interpretation was accepted by the Privy Council in *Bhuboni Sahu and another v. State of Bihar* [1964] AIR SC 1184. This is a decision which we are bound to follow, since it deals with the interpretation of the equivalent Indian section to section 30 of Cap. 108. The same principle was repeated in *PP v. Nordin bin Johan and another* [1983] 2 MLJ 22 (FC).

Mr Halim cited the following statement in *Sarkar's Law of Evidence*, 12 Edn, at p. 324 as reflecting the authorities in India (where a provision identical to our s. 30 is in force) as to the conditions which must be satisfied before resort may be had to the section:

> Before a statement by one of the accused persons can be taken into consideration against the other accused, the following conditions must be fulfilled:

(1) There must be a joint trial for the same offence.

(2) It must be a confession.

(3) The confession of guilt must affect himself and the others, ie, implicate the maker substantially to the same extent as the other co-accused.

(4) The confession of guilt must be duly proved.

Mr Halim contended that, in this case, conditions (1), (2) and (3) had not been satisfied. The accused were not being tried for the same offence in relation to the illegal possession of a firearm. It was true that they were jointly charged but the evidence led by the prosecution was not that they were in joint possession of the firearm but that they were individually in possession of a firearm at different times. Therefore, anything said in a statement by one of the accused which was relevant to the 2nd charge and which implicated a co-accused could not be used against him under s. 30.

Mr Halim also submitted that the judges had not given sufficient weight to the words "affecting himself' which occur in s. 30. He cited a number of cases from India in support of his submission. In *Dr Jainand & Another v. Rex* [1949] AIR 291 it was held at p. 298:

> The words "affecting himself and some other of such persons" are important and do suggest that before the confession made by one person can be taken into consideration as against other persons, who are being tried jointly with him for the same offence, it must affect the maker as well as others. If the statement does not affect the maker thereof or only ascribes to him a part not sufficient by itself to justify his conviction for the offence for which he is being jointly tried with others, it will not be a confession of the nature contemplated by s. 30.

In *Sheroo v. Emperor* [1925] AIR N 78, the court approved two *dicta* from earlier cases:

> The test s. 30 of the Evidence Act intended should be applied to a statement of one prisoner proposed to be used in evidence as against another is to see whether it is sufficient by itself to justify the conviction of the person making it of the offence for which he being jointly tried with the other person or persons against whom it is tendered. In fact to use a popular and well understood phrase the confessing prisoner must tar himself and the person or persons he implicates with one and the same brush. ...
>
> neither can the statement of one prisoner be taken as evidence against another prisoner under section 30 of the Evidence Act, unless the parties are admittedly in *pari delicto*, when, that is, the confessing prisoner implicates himself to the full, as much as his co-prisoner whom he is criminating.

With the greatest respect we have to disagree. Of course the statement has to amount to a confession, otherwise the section would not come into play at all, but we can find nothing in what is the plain language of the section to justify the gloss which these authorities seek to impose upon it. Since a confession necessarily affects the maker, the words "affecting himself and some other of such persons" clearly mean "affecting not only himself but also some other of such persons".

Section 17(2) of the Brunei Evidence Act defines a confession as being "an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed the offence". In applying an identical provision then in force in Ceylon, the Privy Council (Lord Guest gave the Board's opinion) in *Anandagoda v. The Queen* [1962] 28 MLJ 289 held, at p. 291:

> The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts. In this connection their Lordships consider that the view expressed by Gratiaen J in *Seyadu v. King* [1951] 53 NLR 251 at p. 253, "The test of whether an 'admission' amounts to a 'confession' within the meaning of section 17(2) must be decided by reference only to its own intrinsic terms" is correct. It is not permissible in judging whether the statement is a confession to look at other facts which may not be known at the time or which may emerge in evidence at the trial. But equally it is irrelevant to consider whether the accused intended to make a confession. If the facts in the statement added together suggest the inference that the accused is guilty of the offence then it is nonetheless a confession even although the accused at the same time protests his innocence.

This test was applied in *Chin Seow Noi v. Public Prosecutor* [1994] 1 SLR 135.

We are content to apply Lord Guest's dictum in considering whether a statement should be regarded as a confession for the purposes of s. 30, even though the Privy Council suggested the appropriate test in the context of provisions which rendered a confession made to a police officer inadmissible in evidence.

Mr Halim submitted that the judges had not critically examined the contents of the statements made by the defendants and had merely assumed that each was a "confession" within the meaning of that word in s. 30.

So far as Gary is concerned it was submitted that, although he had admitted shooting Mr Lim, he had not admitted that he did so with intent to kill or to cause such bodily injury as is specified in s. 300 of the Penal Code. It followed therefore that his statement was not a confession to murder, of which such an intention is a necessary ingredient, and that, since it was upon Gary's act that the prosecution relied to establish the murder element of s. 396 of the Penal Code, his statement was not a sufficient confession for the purpose of s. 30 and could not be used against the other defendants.

As at present advised we tend to think that, where the question of s. 30 arises on the joint trial of charges under s. 396, the admission of facts amounting to murder is not an element required in any confession at all, for it will be recalled that the charge may be made out even if the actual murderer is not charged or even identified. However, we find it unnecessary to express any decided opinion on this point, for in this instance we are satisfied that the statement of Gary does amount to such a confession. We may immediately refer again to its closing words, "I plead guilty to the charge read to me of robbing and murdering Mr Lim ....", and then to the earlier passages which we set out above. The only inference that can reasonably be drawn from his words is that he did intend to kill. Read as a whole they amply satisfy the test laid down by Lord Guest in *Anandagoda*.

As regards the second charge, even if the accused should have been charged separately (a point to which we shall return later) that would not in our view have altered the position with respect to s. 30.

We adopt the test suggested in the following passage from *Sarkar's Law of Evidence*, 12 Edn, p. 331:

> The test whether they are tried for the same offence is whether the two persons are accused of an offence of the same definition arising out of a single transaction; it is then only that the confession of one may be used against the other, though it inculpates himself through acts separable from those ascribed to his accomplice and capable therefore, of constituting a separate offence from those of the accomplice (*R v. Nur Md*, 8 B 223; see also *R v. Malappa Bin*, 14 Ind Jur NS 19). "Same offence" means identical offence and not an offence of the same kind (*Gour v. R*, sup; *Kundan v. R* A1948 S 65).

Separate charges would have satisfied that test. There would have been offences of the same definition and they would have arisen out of a single transaction, namely the procurement of a firearm for the furtherance of the joint robbery.

***Further Evidence About A Firearm***

Apart from what each of the appellants said about a firearm in their statements, the trial court heard evidence from a number of witnesses. PC Monil (PW4) testified that he was on duty at CP2 on the evening of 30 January 1997. He was called out to the car park and found Suharta (D3) standing near a car with Zainol (D2) in the driver's seat. He knew them both. Suharta wanted help to get the keys of the armoury because he had left his wallet in the armoury. Monil took the keys from CP1 without making an entry in the diary. He went to CP2 and gave them to Suharta. He saw him hand them over to Zainol. Zainol walked towards the armoury; he did not know whether or not Zainol went into the armoury. When Zainol returned to CP2 he told him that he had got his wallet and gave him back the keys. After talking on the phone with Cpl. 837, the person in charge of CP1, he handed the keys to Zainol and asked him to return them to CP1. He made a note in the CP2 diary (entry No. 26) showing that on 30 January 1997 at 1930 PC 3041 (Zainol) had taken the armoury key in control room 2 of RUC. This was inaccurate, he said, because he had given the key to Suharta who had handed it to Zainol.

Cpl. 839 Hj Jamin (PW5) testified that at about 7 pm on 30 January 1997 he noticed that the armoury keys were missing. He first spoke to PC Monil on the phone about them, and then to Zainol. He asked him to return the keys to him at CP1. Zainol did so. This was at about 7.50 pm and he made an entry in the station diary that PC 3041 (Zainol) had done so. When returning the keys, Zainol told him that he had left his wallet in the armoury and had wanted to get it. PC 3304 Rusdiman was present when Zainol handed back the keys.

L/Cpl. Lasim (PW10) gave evidence that when he was on duty at CP1 on 31 January 1997, Zainol (D2) asked him for the armoury keys saying that he needed them to recover his wallet which he had left in the armoury earlier that day. The witness gave him the keys and told two of his colleagues to escort him to the armoury. Shortly afterwards, at 2309 hours one of the escorts (PC 3093) returned the keys to him.

PC 3093 Aminurrashidin (PW11) told the court that after the keys had been handed over to Zainol, he had gone with him in a car driven by Suharta, to CP2. He went into the armoury with Zainol and the other escort after Zainol had used the keys to open the door. He saw Zainol put a Browning magazine on a shelf in the armoury. He then appeared to be looking for something. He did not see Zainol carry anything into the armoury or where he had got the magazine from. Zainol asked him to tell Cpl. 711 not to make an entry in the diary about his visit to the armoury.

The prosecution sought to prove that a particular Browning pistol (the serial number was mentioned in the particulars of the 2nd charge) was used to kill Mr Lim and that this was the firearm which all four accused persons had in their possession unlawfully at various times.

***Expert Firearm Evidence***

Dr Tay Ming Hong (PW52), a firearms expert from Singapore, was called by the prosecution. He examined the four rounds of ammunition recovered from Mr Lim's office as well as the pistol described in the 2nd charge. He testified that after test-firing the pistol, he could not say that the four bullets he was asked to examine had been fired by that pistol. There were similarities between the two sets of bullets. It was possible that the bullets he had been asked to examine had been fired from the pistol. In answer to the Court he said that he could not exclude the possibility either (a) that the pistol had fired those bullets or (b) that the pistol had not fired them. He could say that the pistol had been fired any time within the last 2-3 months.

It is convenient here to recount how the judges dealt with this aspect of the case. After summarising Dr Tay's evidence, the judgment went on:

> It has never been suggested that more than one weapon was involved. We can confidently draw the conclusion that the same weapon was taken out of the armoury to Zainol; handed by him to Kamaluddin; passed on to Gary by Kamaluddin; used by Gary and returned by him to Zainol; who put it back in the armoury.
>
> Haris stated that he thought that 245NY02388 (which was the pistol issued to him) was clean when he examined on 31.1.1997. He is contradicted by Dr Tay, who was satisfied that the weapon had been fired, within 2/3 months before he examined it. We accept Dr Tay's evidence as to this.
>
> A number of cartridge cases were found in the manager's office. Dr Tay said that these were fired from a firearm, which was the same make as the Browning pistol which he examined. But he stopped short of matching the firearm which he examined with the bullets.
>
> There is thus a failure by the prosecution to establish, beyond a reasonable doubt, that the pistol carried by Gary was 245NY02388, though it is probable that this was so.
>
> We do not think that this matters, if we are satisfied that Gary was in fact in possession of a serviceable firearm. The core of an offence against section 28 is the possession of a firearm without lawful authority not possession of any particular firearm. If this requirement of possession is satisfied, it does not matter that the identity of the firearm has not been established beyond a reasonable doubt. To this limited extent, charge 2 should be amended by deleting the words "Browning" and "serial number 245NY02388".

The evidence, which we accept, is that – *a*

(a) a pistol was taken from the armoury by Zainol;

(b) there was only one firearm, which was passed by Zainol to Kamaluddin, and by Kamaluddin to Gary;

(c) it was a serviceable firearm, a fact which is proved by the serious wound, which it caused to Analiza, and the death which it caused to Lim. *b*

...

If any of the defendants did have possession of a firearm, it would have been between 30.1.1997 and 31.1.1997, as the second charge alleges. *c*

***Amendment Of 2nd Charge***

On behalf of Kamaluddin (D1) and Zainol (D2) it has been submitted that the court erred in amending the 2nd charge in the way that it did, (while delivering judgment), without complying with the procedure laid down in *d* ss. 158 and 159 of the CPC.

It was contended that the defence had been conducted entirely on the basis that the prosecution case was founded on the possession of the particular firearm identified in the charge. The result of the amendment had been to confront the defendants with a wholly different case, one which they had been *e* given no opportunity to meet. This, it is said, led to a miscarriage of justice of the kind not curable by the proviso.

There is, of course, no doubt that the prosecution sought to prove that the appellants had possessed a particular firearm and that the evidence fell short *f* of establishing this. But, for the offence charged, it is only necessary to prove that the accused was in possession of a firearm, as defined. It does not matter that the firearm is never identified or that it is not produced to the court. It is all a matter of the sufficiency of the evidence. Here, the essence of the prosecution case was clearly that Gary (D4) had used a firearm when he *g* injured Analiza and killed Mr Lim and that it was the same firearm that the other appellants had handled at various times both before and after the shooting. On the case put forward, while the prosecution had to prove that the same gun was involved throughout, the case did not depend on the gun being the one mentioned in the 2nd charge. *h*

We cannot accept the suggestion that the deletion of the make and serial number of the gun gave rise to "an entirely different case", nor do we feel that in fact the defences put forward would have been in any way different had the original charge merely alleged the possession of "a firearm". Indeed counsel have not even suggested that. *i*

Mr Zakaria was prepared to concede that the procedure for the amendment of a charge laid down in the CPC had not been followed but invited us to apply the proviso contained in s. 415(2) of the CPC.

In the circumstances, of this case, we feel that the judges might reasonably have decided that the reference to the particular weapon in the charge was mere surplusage and that no amendment was necessary. But since they did consider it desirable to amend the charge, it would have been better if they had indicated what they had in mind to do before delivering judgment, and invited submissions from counsel.

We are satisfied that no miscarriage of justice has actually occurred by the course taken by the court. We have no doubt that we have power to apply the proviso for, like McMullin, J in *Shabrin bin Tarang v. Public Prosecutor* [1994] JBC 430, we decline to follow the line of authority which holds that the omission to comply with the statutory requirements regarding the amendment of charges is always an irregularity which is not curable under a provision such as s. 415(2) of the CPC.

We gratefully adopt what McMullin, J had to say at p. 434 of *Shahrin's* case, after referring to a Malaysian case which had so held:

> As against this decision Mr Yusree, for the respondent relies on the decision of the Malaysian Supreme Court, in *Hee Nyuk Fook v. Public Prosecutor* [1988] 2 MLJ 360. In that case, a case of cheating, a charge had been twice amended and had not been read or explained to the accused on either occasion. The alterations consisted of changing the stated amounts of money said to have been the subject of the offence. Syed Agil Barakbah, C.J. delivered the judgment of the Court and he pointed out that in the case of *Singah*, which had been cited in argument before the Court, the effect of the amendment was to cure a defect which, if this had not been done, would have rendered the trial nullity. He said therefore that it had been incumbent in that case on the trial magistrate to read and explain the charge to the defendant. At page 362 of the report he proposed a general rule in the following terms –
>
> > The question that arises is whether section 158(ii) is mandatory or directory. In our view, the word "shall" appearing therein, though generally taken as mandatory, does not mean to be so in every case. No hard and fast rule can be laid down because it depends on the facts and circumstances of the particular case, the purpose and object for which such provision is made, the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way or the other . ... We are of the view that the safest way is to look into the subject matter of the case, consider the importance of the provision that has been disregarded, the relation of the provision to the object of the Code and decide in that order

> whether the matter is imperative or only directory (see *Howard v. Bodington* at p. 211).
>
> In my view this is the authority which is clearly to be preferred, based as it is on what I must describe as the common sense approach.

We have no hesitation in applying s. 415(2) of the CPC since we are sure that no miscarriage of justice actually occurred.

We do not accept that, when the court said: "It has never been suggested that more than one weapon was involved" in the judgment, this was an indication that the court was shifting the burden of proof to the defence to raise the issue of the possibility of another gun being used. All along the case was about the gun allegedly used by Gary (D4) and handled by the others. The other appellants denied handling any gun at all.

***Form Of 2nd Charge***

It is here convenient to mention that we allowed Mr Sankaran to file an amendment to D4's Notice of Appeal about the form of the 2nd charge. His submissions on the point were adopted by counsel for Dl and D3.

The Charge was as follows:

> That all of you between the 30th day of January 1997 and the 31st day of January 1997 in Brunei Muara, Brunei Darussalam, in a special area, without lawful excuse did have in your possession a firearm without lawful authority, to wit, a Browning pistol bearing serial number 245NY02388 and you have thereby committed an offence contrary to section 28 of the Public Order Act (Cap. 148) and punishable under the same.

The new ground of appeal was that the charge was bad for duplicity because an offence under s. 28 of the Public Order Act was complete on each occasion of possession by each accused of the firearm. Thus, in our view, the complaint was not one of duplicity but of misjoinder. The prosecution, it was said, had been conducted on the basis that each accused possessed the firearm at a different place and time, and not on the basis of simultaneous possession. The evidence adduced showed that there should have been four different charges of possession, one against each of the accused.

When invited by the court to say what miscarriage of justice had occurred if his submissions were to be upheld, he did not suggest that the accused had been misled by the form of the charge or prejudiced in relation to the way their defence had been conducted. Rather, he contended that the miscarriage was that if they had been charged in separate charges as they should have been, then s. 30 of the Evidence Act could not have been used.

We have earlier expressed the view that in the circumstances of this case, s. 30 would have been applicable even if four separate charges of possession had been laid, and so the prejudice relied upon by Mr Sankaran is not available to the appellants.

However, in our judgment it was proper in this case (where the prosecution sought to establish that the same gun had been handled by each of the accused for the purpose of, and in connection with, the same robbery) to have charged the accused jointly.

lt is interesting to note that in the case brought to our attention by Mr Zakaria, *Public Prosecutor v. Chong Yaw Mui & Others* [1996] JCB 244, a joint charge of possession of firearms was preferred against four defendants involved in a gang-robbery. Mr Zakaria informs us that the case went to appeal and no suggestion was made by anyone that the joint charge was bad.

***Admissibility Of Kamaluddin's Statement***

In their ruling at the conclusion of the *voire dire* the judges said:

> Various allegations of inducements, threats, promises, physical assaults and pressures have been made against all four defendants against various police officers. These are said to have caused the defendants to make the four SANW which have been presented by the prosecution.
>
> We do not propose to deal in detail with these various allegations, other than to say that we are satisfied beyond reasonable doubt that they are groundless and that the four SANW made by the defendants were voluntary, within the meaning of section 117 CPC.
>
> We accept the evidence of the various police officers concerned, both in the statements themselves and in the period after their arrest and before the SANW were taken from them, that the allegations are untrue. The statements were properly taken and not the result of any improper conduct by any police officer. We reject as untrue the complaints made by the defendants against various police officers.

On behalf of Kamaluddin (D1), Mr Sawan submitted that the court had erred in law in admitting his statement after Notice of Warning despite his evidence that he had been forced to make it by Supt. Wahab (PW34) and Senior Inspector Feisal (PW19) and had been physically abused by the latter. He had also been induced to make the statement by unidentified CID officers. It was also suggested that in reaching the conclusion that his allegations were groundless, the judges had failed specifically to direct their attention to the question whether the allegations might be true. They should specifically have

considered whether the police officers' alleged conduct could amount to oppression or inducement which might have been so regarded by the appellant.

The judges, it is contended, should have directed their attention to the fact that the evidence showed that Inspector Muhaimin (PW42) who recorded the appellant's statement had taken no steps to ensure that he had not earlier been induced or forced to make a statement. We understood Mr Sawan to be suggesting that the Inspector should have conducted the sort of inquiry entered into by the magistrate, as shown in the judgment in *Abdullah Bin Awang Bonkok v. Public Prosecutor* [1956] 22 MLJ 90.

In his evidence in the *voire dire*, Kamaluddin (D1) said he had made the statement he challenged because he had been asked by S/I Feisal to give the same statement as before, a statement he had been forced to make because the S/I had thrown a carton of drink at him, and had threatened to shoot him. Supt. Wahab (PW34) had told him that he had power to reduce the charge if he made a statement; this he had believed. If these promises had not been made he would not have made the statement. When Inspector Muhaimin (PW42) read the charge and warning, neither was explained to him. While there were no threats made by him as to what would happen if he did not sign, he was confused at the time. He accepted that no promise, inducement or threat was made by the Inspector but said that he was not asked if anyone else had threatened him or promised him anything.

S/I Feisal and Supt. Wahab gave evidence to the court as to their involvement in the investigation. S/I Feisal denied throwing a carton of fruit juice at the appellant or threatening to shoot him. It does not seem to have been put to Supt. Wahab that he told the appellant that he had power to reduce the charge if he made a statement.

Mr Sawan contends that Kamaluddin (D1) was convicted entirely on his own admission. There was no other evidence to corroborate his statement. The conviction was unsafe in all the circumstances of the case, including the fact that there were discrepancies in the evidence. As examples, the appellant (D1) had said that Zainol (D2) had given him the gun on 29 January whereas Zainol had given 30 January as the date. And in Gary's (D4) statement he had said that D1 had handed the gun to him on 31 January, while the appellant said he had done this on 30 January.

Mr Sawan also submits that Zainol's (D2) statement was not a confession and therefore could not be used to support the appellant's statement.

We are quite unable to accept the submission that when the judges rejected the allegations made by DI against the police officers concerned and ruled that his statement was admissible, that they had not considered whether the allegations might be true – in their ruling they said that they had been satisfied beyond reasonable doubt that the allegations were groundless.

Everything will depend on the circumstances of a particular case, but we have found no evidence to support the contention that the Inspector should have enquired whether he had earlier been induced to make a statement. He does not have the duty of making the sort of inquiry the magistrate is demonstrated to have made in *Bonkok's* case (similar to the duty imposed on a magistate by s. 119(3) of the Brunei CPC).

We have not been persuaded that the judges wrongly admitted D1's statement.

It seems to us that Kamaluddin's statement was the foundation for a strong case against him and would alone have justified his conviction on both charges. The court was also entitled to take into consideration in support of that statement what Zainol (D2) had said about Dl being in possession of the gun on the evening of 30 January 1997 as well as what Gary (D4) said about Dl instructing him to return the gun to him after the robbery.

***Constitution Of The Court***

By his first ground of appeal, Zainol (D2) complains that the judges had erred in law in rejecting his submission that the court had not been properly constituted to try him. The matter arose in this way. During his closing address to the court, after all the evidence had been heard and the defence closed, Mr Ismail, for D2, objected to the composition of the court, explaining that the lateness of his submission was due to the fact that the point had only just occurred to him. The court allowed him to take the point, which was this: that Chong J should not have taken part in the trial of D2 because on 27 February 1997 (an occasion on which D2 had appeared before the Magistrate's Court on remand), Chong J, then sitting as a magistrate, had recorded the following statement from him: "I wish to change the statement I made to the police. I was forced to make the statement".

The judges rejected this objection. In their judgment they pointed out that all that the magistrate had done was to record a complaint made by D2 during a remand hearing. No reasonable man could have come to the conclusion on this account that D2 had not had a fair trial. Any such belief would have been wholly unreasonable.

Mr Ismail, on D2's appeal, repeats and amplifies the submissions that did not find favour with the trial court. He argues that the magistrate should have examined the appellant on oath as to the substance of the complaint in accordance with s. 133(1) of the CPC. Since this had not been done, it could be inferred that the magistrate had rejected the complaint and had failed to pay due regard to it. At his trial in the High Court, D2 had challenged the admissibility of his statement on the same grounds. Therefore, it is said, it became necessary for Chong J to determine the admissibility of the statement in the trial in circumstances in which he had previously formed a view adverse to the appellant.

The authorities showed, Mr Ismail submitted, that actual bias need not be shown, it was sufficient if an impression of bias might be created in the mind of a disinterested person. There was a reasonable apprehension of bias since (Chong J was called upon to consider the admissibility of the statement having apparently already formed a view without hearing any evidence. Mr Ismail further submitted that as soon as D2 had indicated, by the notice sent by his lawyers to the court that he was challenging the admissibility of his statement, and why, (Chong J should have reconsidered his position and should have disqualified himself. This notice had been sent on 24 October 1997, the 5th day of the trial.

Finally, on this point, Mr Ismail contends that in failing to disqualify himself, D2 had been deprived of a crucial witness (the magistrate) on the *voire dire*. The court should have placed great weight on the fact of the complaint. Had they done so they might have had a reasonable doubt about its voluntariness.

The section of the CPC relied upon by Mr Ismail is in these terms:

> 133.(1) When a Judge or magistrate takes cognisance of an offence on complaint the Judge or magistrate shall at once examine the complainant upon oath or affirmation and the substance of the examination shall be reduced to writing and shall be signed by the complainant and also by the Judge or magistrate.

The word "complaint" has the meaning assigned to it in s. 2(1) of the CPC:

> "complaint" means the allegation made orally or in writing to a magistrate with a view to his taking action under this Code that some person whether known or unknown has committed or is guilty of an offence.

With respect to Mr Ismail's careful arguments, we find that the grievance advanced on D2's behalf is entirely misconceived, based as it is on s. 133 of the CPC which clearly has no bearing on what happened. Chong J, when he

sat as a magistrate on 27 February 1997 on the remand hearing, was not taking cognisance of an offence on "a complaint" of the kind contemplated by s. 133(1), when read with the relevant definition in s. 2(1). He was doing his duty to record something important that a remand prisoner had said during his remand hearing. It would have been quite wrong for the magistrate to have investigated the matter on that occasion. It is not difficult to imagine the consequences if the magistrate had done what Mr Ismail says he should have done. What would be the standing of any inquiry that he made, when the accused came to be tried? Would it take the place of the *voire dire*? If the magistrate found no truth in the allegation that "he was forced" would that finding be binding on the accused at the trial? One has only to ask these questions to appreciate how impossible it is to accept Mr Ismail's submission on this point.

Mr Ismail relied heavily on the complaint which the magistrate had recorded on 27 February. He suggested that this fact was consistent with D2's evidence that he had been forced to make the statement and was strong evidence that it was not made voluntarily. Mr Ismail, on a number of occasions contended that the value of the complaint had been enhanced by the fact that D2 had made it at the earliest opportunity. It may be that there is some misunderstanding here, but the record of the Magistrate's Court which was before us showed clearly that he first appeared before the magistrate on 3 February 1997, one day after his statement was recorded, and on 17 February, and it was on the third remand, on 27 February, that he indicated that he wished to change his statement.

***Admissibility Of Zainol's Statement***

Mr Ismail went on to submit that the judges should not have admitted Zainol's statement after Notice of Warning because there was sufficient evidence to show that it had not been voluntarily made – this was shown by the complaint he had made to the magistrate on 27 February and by the fact that he had been subjected to interrogation by the investigating officer for about ½ an hour before his statement was recorded.

Mr Ismail took us through the testimony of the police officers who gave evidence about what happened before Zainol gave his statement and argued that this demonstrated that his will had been sapped by the oppression revealed, having regard, too, to his asthmatic condition, so as to render the statement inadmissible. The court's finding (for which no reasons had been given) that the appellant's allegations had been "groundless" could not be justified in view of the clear evidence to the contrary.

Our examination of the evidence of the police officers concerned does not reveal that there had been oppression by words or conduct of the kind suggested by Mr Ismail, once the court had rejected allegations of assault and inducement. There is no evidence to suggest that the duration and manner of D2's questioning by the police on 1 and 2 February amounted to oppression.

We do not doubt that the judges considered all the relevant evidence. It is not to be expected, unless any particular matter calls for comment, that judges, when giving their decision at the conclusion of a *voire dire*, will set out the evidence and deal with each allegation specifically. If allegations are not believed there is little more that a judge can say in his ruling than that he does not believe them. This is the same whether there is one, or several accused.

We are not able to accept the submission that D2's statement was wrongly admitted.

As in the case of D1, the statement made by D2, once it was accepted as being true, makes out a very strong case against him, quite apart from the evidence of Kamaluddin (D1) and Suharta (D3) which supports his possession of the firearm on different occasions.

The court disbelieved the evidence D2 gave to court. Subject to the establishment of the fact that murder was committed in the course of the robbery by one of the gang-robbers, there was weighty evidence against him on both charges.

***Suharta's Role***

The first ground of appeal raised by Suharta (D3) is that the judges had misdirected themselves on the application of s. 396 of the Penal Code in that they had not sufficiently considered the distinction between (a) an intention to act jointly with another to commit robbery (an intention which must necessarily exist prior to or at the time of the robbery) and (b) an intention formed after the completion of the robbery and murder to assist Gary (D4). Zainol (D2) also relies upon the submissions made by Mr Yusof Halim on this contention.

Mr Halim accepts that for the purposes of the offence punishable under s. 396 of the Penal Code, the prosecution does not have to prove that an accused who did not actually take part in the murder had a common intention with the killer, but submits that it must be proved that he acted "conjointly" in committing the robbery – this denotes a united or concerted action and must exist before or at the time of the robbery.

Mr Halim has drawn our attention to the passage in the judgment when the judges discuss *Prasong Bunsom & Others v. Public Prosecutor* [1995] 3 SLR 433. They set out an extract from the report of that case, from p. 447E to p. 448H. The last paragraph of the passage cited is as follows:

> However, counsel for the second appellant argued that the trial judge had erred in applying s. 396 to the second appellant as, based on his testimony in the witness stand, he had merely driven the van and had not even entered the site, let alone known about or participated in the murder of the deceased. Persuasive as it may seem, we rejected that argument. Even if we accepted the second appellant's testimony to be true, that his participation amounted to no more than that of the driver of the vehicle, he had gone there in furtherance of the same plan, which was to assist in the robbery. As such, the degree of his participation was not material, neither was it necessary that the second appellant should have participated in or known that a murder had been committed. The severity of this rule is based on the rationale that when five or more persons went to a particular place and committed a robbery, and in the course of it a murder was committed, there is no need to prove that each and every one of them had the intention to bring about the result of death as well.

While this was a correct statement of the law, Mr Halim submitted that the judges in the case before us had erred in the part of their judgment which immediately followed the citation. The judges said:

> The effects of this judgment are as follows:
>
> (a) if the defendants go to a place in furtherance of a plan to commit a robbery there is no need to prove that everyone of them intended to bring about the death as well;
>
> (b) it does not matter if a defendant is not present at the actual place of killing (see also *Muka bin Musa v. PP* [1964] 30 MLJ 275, in which the defendant, not present at the murder but guarding the get away boat was held to have been rightly convicted of gang robbery);
>
> (c) the driver of a get away car is deemed to have taken part in the gang-robbery;
>
> (d) anyone who is present in order to assist in the furtherance of the plan to rob is conjointly committing gang robbery, though this will not apply to any person who is unable to assist in the plan, because he is not within a distance which will enable him to do so.

Mr Halim argued that para. (c) above indicated that the judges had wrongly reasoned that the mere fact of being the driver of a getaway car raised the presumption that the driver had taken part in the robbery. This approach had

led to the judges' erroneous conclusion that proof of the fact that Suharta (D3) had driven Gary away was of itself sufficient evidence that he was taking part in the gang robbery.

It seems to us quite wrong to read para. (c) on its own and to suggest, in the light of the remaining paragraphs and the rest of the judgment, that the judges misunderstood the passage from *Prasong Bunson's* case which they had set out immediately before their summary of the case. They were certainly not suggesting that the mere fact that a person is proved to have driven a robber away from the scene of a robbery creates a presumption that he was also one of the robbers. The use of the expression "getaway car" negatives this. In ordinary language a "getaway car" is one which is used to help someone escape from the scene of a crime and driven by a culprit who has been waiting nearby for that purpose.

The judges' summary of the case against D3 shows quite clearly that they did not make the elementary mistake Mr Halim suggests. Judgments must be read as a whole.

Mr Halim submitted that the judges should not have rejected what Dl had said in his statement to the effect that he thought D3 did not know of the plan since he had given such a detailed statement about his involvement and the part D2 and D4 had played. D1's statement suggested the real possibility that D3 only became involved after the robbery had been committed. We found no substance in this argument. The judges did not believe that part of the D1's statement.

We do not accept that the trial court did not notice, or give sufficient weight, to the discrepancies which were revealed when the statements of the appellants are compared with each other. The significant discrepancy as to the date when Zainol (D2) took the gun from the armoury (he said it was on 30 January) and the date when Kamaluddin (D1) said Zainol gave a gun to him (he said it was on 29 January), was dealt with by the judges and having regard to the other evidence which was before them, and which they accepted, we cannot say that they were not entitled to prefer the date given by D2. There were other discrepancies between the various statements. It would be surprising if there were not. But in our view they do not necessarily vitiate the judges' findings.

Although Suharta did not admit taking part in the robbery, in his statement which was properly admitted in evidence he told an extraordinary story as to why he had admitted the man he saw running along the road into his car and

the circumstances in which he received the bag which turned out to contain money. He told an equally extraordinary story in his testimony to the court. He said that he had unlocked the door of his car from the inside because the man he later drove away had asked him to do so in a rough voice. In cross-examination by counsel for one of his co-accused he made it plain that he did not see a gun when he was outside the car and was therefore not then frightened. He then gave the explanation that since the man was a THS security guard, he thought he had the right to search his car. On the evidence the court was fully entitled, for reasons that it gave, to conclude that he was not there by chance and that the assistance he gave to Gary to make his getaway was not innocent.

Moreover, on the evidence, the court's finding that the $6,000 which he had concealed behind his house was his share of the proceeds of the robbery was fully justified.

Once again, subject to proof that one of the gang-robbers committed murder, the case against Suharta (D3) was very strong.

***Proof Of Intent For Murder***

Mr Sankaran, for Gary (D4) submitted that it had not been proved that D4 had been guilty of murder. The judges found that when D4 fired at Mr Lim he intended either to kill him (satisfying para (a) of s. 300 of the Penal Code) or to cause him such bodily injury as was likely to cause death (para (b) of s. 300).

As his submissions were developed, they resolved themselves into one contention, that anyone who had intended to kill would not have shot Mr Lim where he did. He was very close to him and if that had been his intention he would have directed the pistol towards more vulnerable parts of his body.

One of the wounds Dr Telesinghe (PW33) found when he examined the deceased post mortem was described thus:

> 3) A circular wound 0.8 cm diameter with a concentric abrasion about 0.2 cm situated at the 3rd rib space 4½" left of the mid line (sutured - ENTRY wound). The wound is directed downwards and to the right. Puncturing the lower lobe of left lung. (Upper segment) Lacerating the heart left venticle posteriorly complete severance of the aorta at level of the diaphargm. It has fractured the 9th thoracic vetebra and exited on the back of the right side of the chest.

On account of this wound alone, we find it impossible to accept Mr Sankaran's submission. This was a very clear case of murder.

The prosecution presented an overwhelming case against each of the appellants of their participation in an appalling crime. They were rightly convicted after a fair trial. Their appeals are dismissed.